Supreme Court, U.S.
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No. 90-1445

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1990

STEPHEN IVY AND CHARLENE IVY,
Petitioners,

v.

ROBERT W. MYERS,
Respondent.

Brief In Opposition To Petition For Writ Certiorari

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17p

QUESTION PRESENTED

Was petitioners' entitlement to free exercise of their religion impermissibly burdened where:

(1) The Bankruptcy Court offered to approve petitioners' Chapter 13 reorganization plan, including an allowance for religious tithes, if petitioners would extend the term of that plan so that their creditors would not be prejudiced by petitioners' tithing; and

(2) Petitioners rejected the Bankruptcy Court's reasonable accommodation of their religious practices?

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STATEMENT OF THE CASE

Respondent accepts petitioners' statement of the case.

REASONS TO DENY THE WRIT

A. This Case Is Not Worthy Of Supreme Court Review.

This appeal appears to present intriguing issues concerning the interplay between the First Amendment and the bankruptcy laws: Must creditors subsidize a debtor's choice of charities? What is the "reasonably necessary" expense of religious observance--and, perhaps, of salvation? What is the proper application of Employment Div., Dep't of Human Resources v. Smith, 494 U.S. ____, 108

L.Ed.2d 876 (1990), in a non-criminal context?

There is less here than meets the eye. Intriguing though these issues may be, this case is a flawed vehicle for resolving them.

This is so for three reasons. First, this case does not cleanly present the "tithe" vs. "no tithe" issue. The bankruptcy court did not require the Ivys to forego tithing as a condition of Chapter 13 relief. Rather, the court attempted to reasonably accommodate the Ivys' religious practices by offering a compromise, an 18-month extension of the Ivys' payment period, which would have permitted petitioners to continue to tithe without prejudicing their creditors. Most

simply, the Ivys could have paid their creditors the same amount over 54 months, while tithing, as they would have paid their creditors over 36 months, without tithing.

The Ivys rejected this reasonable accommodation.

Thus, the "free exercise" burden at issue in this case is not a complete prohibition on all tithing as a condition of Chapter 13 plan approval. It is, rather, an extended repayment period, coupled with tithing, as a condition of Chapter 13 approval. So restricted, that burden--this case--does not warrant this Court's scrutiny.

Second, in a related sense, because of the peculiar facts of this case, the lower courts did not reach the

constitutional issues petitioners raise. Instead, those courts simply held that even assuming the Ivys had some constitutionally protected entitlement to tithe while pursuing Chapter 13 relief, the bankruptcy court's proposal represented a reasonable accommodation of that entitlement. See Petition for Writ of Certiorari at App. 3-4, 7.

The record is, thus, underdeveloped. Whatever benefit this Court derives from a "percolating" of the issues during the appellate process is not present here.

Third, this Court will have other, better, opportunities to address these issues. As petitioners' survey of allegedly "conflicting" lower court decisions shows, there have been nearly

a dozen reported bankruptcy/tithe decisions in the last five years. See Petition for Writ of Certiorari at 14-17. Nearly all of these have been of the pure "tithe" vs. "no tithe" variety.

It is best to wait.

B. The Ninth Circuit's Holding Does Not Conflict With Holdings of Other Lower Courts.

Petitioners note, correctly, that there is a split among various lower district and bankruptcy courts over the proper treatment of tithes in bankruptcy. However, the bankruptcy court's disposition in this case, as affirmed by the Ninth Circuit, does not conflict with any reported decision.

Only one other court has addressed the propriety of the sort of "reasonable

accommodation" plan extension proposed by the bankruptcy court in this case. See In Re Wood, 92 Bankr. 264 (Bkrtcy. S.D. Ohio 1988). That court confirmed such an extension. Id. (confirming inclusion of $43 monthly church tithe in Chapter 13 plan, where proposed repayment period was 56 (not 36) months, if extended repayment period produced a "significantly higher dividend" for general unsecured claimants than would have been paid if objection to confirmation had been sustained).

Finally, it must be emphasized that there is no conflict of authority at the court of appeals level. For now, there has been only one reported bankruptcy/tithe at the district court

level. See In Re Green, 103 Bankr. 853 (W.D. Mich. 1988).

Only this case (which was unreported at the district court level) has reached the court of appeals level. The Ninth Circuit's disposition here is, of course, unpublished.

C. The Ninth Circuit's Holding Does Not Conflict With Decisions of This Court.

Petitioners' argument that the Ninth Circuit's holding conflicts with this Court's First Amendment decisions, specifically including Hobbie v. Unemployment Appeals Commission, 480 U.S. 136 (1987), fails for four reasons:

First, Hobbie antedated Employment Div. Dep't of Human Resources v. Smith, 494 U.S. ____, 108 L.Ed.2d 876 (1990). In Employment Div. v. Smith, this Court

held that Oregon's prohibition on use, including sacramental use, of peyote did not unconstitutionally burden the free exercise of religion. In so holding, this Court emphasized that any burden on religious practice resulting from even-handed application of a facially neutral and generally applicable regulation does not violate the Free Exercise Clause: "We have never held that an individual's religious belief excused him from compliance with an otherwise valid law prohibiting conduct that the State is free to regulate." 108 L.Ed.2d at 885.

Here, there is no suggestion that the bankruptcy court treated petitioners' religious tithe any differently than it would have treated a secular charitable contribution.

Rather, the court adhered to a facially neutral and generally applicable principle that Chapter 13 creditors should not be required to subsidize a debtor's choice of charities. Charity, whether religious or secular, begins at home. Given this neutrality, there could be no violation of the Free Exercise Clause.

Second, this Court in Smith noted that the test set forth in Sherbert v. Verner, 374 U.S. 398 (1963), on which Hobbie turned, has never been applied to invalidate any governmental action "except the denial of unemployment compensation." See 108 L.Ed.2d at 888. Thus, Hobbie (and related authority pertaining to denial of unemployment

compensation benefits) appears to be constitutionally sui generis.

Third, while Hobbie involved the potential loss of government benefits, the bankruptcy court under Chapter 13 does not award or deny substantive governmental benefits. Instead, the court engages in a balancing and adjusting of the interests of private parties according to neutral statutory principles. See, e.g., In Re Navarro, 83 B.R. 348, 352 (Bkrtcy. E.D. Pa. 1988), citing United States v. Lee, 455 U.S. 252 (1982).

Fourth, to the extent that bankruptcy discharge is deemed a substantive governmental benefit, debtors can secure that "benefit," while still tithing, by converting their

Chapter 13 bankruptcy into a Chapter 7 bankruptcy. See, e.g., In Re Navarro, supra, 83 B.R. at 353; In Re Curry, 77 B.R. 969 (Bkrtcy. S.D. Fla. 1987). While the wisdom of encouraging debtors to convert to a Chapter 7 proceeding may be debated, that selection of discharge options does not have constitutional implications.

Smith, not Hobbie, controls. The bankruptcy court's "reasonable accommodation" did not unreasonably burden petitioners' free exercise of religion.

CONCLUSION

The Petition for Writ of Certiorari should be denied.

Respectfully submitted this 24th day of May, 1991.

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